United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7160

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B P/S

No. 75-7160

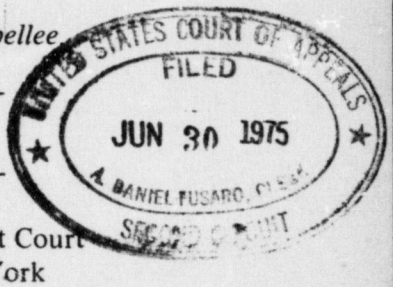
SALINAS LETTUCE FARMERS COOPERATIVE

Appellant,

v.

SALT CITY PRODUCT CO., INC.

Appellee.



BRIEF FOR APPELLANT

Appeal from the United States District Court
for the Northern District of New York

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TABLE OF CONTENTS

TABLE OF CASES

STATUTES AND REGULATIONS INVOLVED

Statutes

7 U.S.C.A. 499
7 U.S.C.A. 499 g (c)
U.C.C. § 2-607(4)

Regulations

7 C.F.R. 46.43 (i)
7 C.F.R. 46.43 (j)
7 C.F.R. 47.20 (b) (1)

Regulations Involved

7 C.F.R. § 46.43

Trade Terms and Definitions

Terms construed.

The following terms and definitions, when used in any contract or communication involving any transaction coming within the scope of the Act, shall be construed as follows:

* * *

(i) "F.o.b." (for example, "f.o.b. Laredo, Tex.," or "f.o.b. California") means that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition (see definitions of "suitable shipping condition," paragraphs (j) and (k) of this section), and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed. The buyer shall have the right of inspection at destination before the goods are paid for to determine if the produce shipped complied with the terms of the contract at time of shipment, subject to the provisions covering suitable shipping condition.

(j) "Suitable shipping condition," in relation to direct shipments, means that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties. If a good delivery standard for a commodity

is set forth in § 46.44, and that commodity at the contract destination contains deterioration in excess of any tolerance provided therein, it will be considered abnormally deteriorated. The seller has no responsibility for any deterioration in transit if there is no contract destination agreed upon between the parties.

* * * *

7 C.F.R. § 46.44

Good Delivery Standards

Good Delivery

"Unless otherwise agreed to between the contracting parties, "Good Delivery" in connection with f.o.b. contracts of purchase and sale means that the commodity meets the requirements of the contract at time of loading or sale and, if the shipment is handled under normal transportation service and conditions, will meet the following additional requirements on delivery at the contract destination:

(a) *Lettuce.* (1) If the contract specifies a U.S. grade, the lettuce may contain an average of not more than 3 percent condition defects, including not more than 2 percent decay affecting any portion of the head exclusive of wrapper leaves in excess of the destination tolerances provided for the applicable grade in the U.S. Standards for Grades of Lettuce. (For example, the U.S. No. 1 grade provides a 12 percent tolerance for damage at destination. If a lot contains 5 percent damage by permanent grade factors, 7 percent of the tolerance can be applied to

damage by condition factors. The additional 3 percent Good Delivery tolerance would then allow a total of 10 percent damage by condition factors in this shipment at destination.)"

Statement of the Issues Presented

Whether in a reparation proceeding before the Department of Agriculture based solely on the written record, the Judicial Officer's decision was erroneous in that he (1) placed the burden of proof of breach of warranty on appellant-seller when the goods, shipped by rail, were accepted by the buyer, (2) decided issues of facts in the buyer's favor without any evidentiary support, and (3) misapplied a long standing interpretive policy of the Secretary of Agriculture.

Statement of the Case

This is an appeal from a summary judgment in favor of appellee by the United States District Court for the Northern District of New York on an appeal from a decision by a Judicial Officer of the Department of Agriculture in a reparation proceeding. Appellee is a buyer of perishable commodities and is, therefore, a person licensed under the Perishable Agricultural Commodities Act (7 U.S.C.A. § 499). Pursuant to the Act, a person aggrieved by such a licensed person's conduct, allegedly in violation of its standards, may file a petition with the Secretary of Agriculture seeking relief. Following a contract dispute over a railroad car load of lettuce sold by appellant to appellee, appellant filed a reparations petition with the Secretary on November 16, 1970, pursuant to the Act, seeking money damages, i.e., the unpaid balance of the contract price. Since the controversy involved less than

$3,000 no oral hearing was conducted. (7 C.F.R. § 47.20(b)(1)).

Following submission of various papers and exhibits by the parties and an Investigative Report by the Regulatory Branch of the Fruit and Vegetable Division of the Department, the Judicial Officer in the Office of the Secretary issued his decision on August 19, 1971, dismissing the complaint. A subsequent petition for reconsideration was denied on October 19, 1971.

On November 18, 1971, pursuant to Section 7(c) of the Act (7 U.S.C. 499g(c)) appellant appealed the reparations decision by filing a notice of appeal and petition in the United States District Court for the Northern District of New York—the district in which appellee is located. Thereafter, on May 28, 1974, appellant filed a motion for summary judgment and a stipulation of facts that the case would be decided upon the stipulation and exhibits without a trial. On December 26, 1974, the District Court entered an order denying appellant's motion for summary judgment, entered judgment in favor of appellee, and affirmed the decision and order of the Secretary of Agriculture. This appeal followed.

Statement of Facts

On May 6, 1970, appellant, hereinafter referred to as Seller, sold to appellee, hereinafter referred to as Buyer, one railroad car load (1,200 cartons) of "Downtown" Brand U.S. One California Iceberg lettuce. The lettuce was to be shipped by railroad car from California to the Buyer in Syracuse, New York. The contract provided that the lettuce was F.O.B. shipping point and that it was "made in contemplation of and subject to trade terms and definitions of the Perishable Agricultural Commodities Act."

Seller shipped the lettuce from Salinas, California, in a refrigerated railroad car on May 6, 1970. (App. 6, 14) Prior to departure that day a joint Federal-State inspection of the lettuce in the car was made, and it was certified to be "U.S. No. 1, 89% hard and firm" as required by the contract. (App. 5)

Normal transportation time from Salinas, California, to Syracuse, New York, is "seventh morning delivery", meaning in time for the market (6 a.m.) the seventh morning after departure, which would be May 13. However, the railroad car did not arrive in Syracuse until 2 p.m. on Thursday, May 14, 1970. Buyer opened the car, visually inspected the lettuce, and moved one hundred cartons to its store one hundred yards away. (App. 14, 35) A Federal inspection was made the next morning on May 15. The inspectors found the refrigeration motor running and the temperature at the doorways 38°F at the top and 39°F at the bottom. They certified the lettuce to be "Grade: U.S. No. 1, 81% hard or firm." The inspection was limited to the upper three layer cartons between the adjustable load dividers which were located approximately seven feet from each side of the door. Buyer then removed additional lettuce from the car as needed for sales although it did not check the temperature at any time. (App. 7, 14)

At 10 a.m. on Monday, May 18, 1970, another Federal inspection was made of the lettuce then remaining in the car—Buyer placed the number of cartons remaining at 700. The inspectors reported that the refrigeration motor was running; that the temperature was then 37°F, both at the top and the bottom of the first stack of cartons behind the divider; and that the lettuce "Meets Quality Requirements but fails to grade U.S. No. 1, 81% hard or firm only account condition". Condition was reported as

> "Wrapper leaves: No decay. Head leaves: Range from 5 to 14 heads per carton, average 37% damage and including 15% serious damage by a reddish-brown blotch type discoloration affecting various sections of leaves. Average 1% decay." (App. 15)

Buyer continued to remove lettuce from the car as needed, finally completing unloading of the car on May 20, 1970, at 3 p.m. at which time the car was released to the railroad. (App. 36) By telegrams on May 20, 1970, sent to Seller and to the broker, Buyer complained, as follows:

To Seller:

> "HOLDING YOU AND BROKER RESPONSIBLE FOR ANY LOSS INCURRED PFE 475688" and

To the broker:

> "PLEASE BE ADVISED THAT I INTEND TO HOLD YOU AND YOUR ORGANIZATION RESPONSIBLE FOR ANY LOSS INCURRED DUE TO YOUR FAILURE TO HANDLE PROMPTLY AND PROPERLY WITH THE SHIPPER PFE 475688" (App. 16)

Samples of the lettuce were sent to the Agricultural Research Service of the Department of Agriculture and to Cornell University. The Agriculture Department reported as follows:

> "The brown discoloration on the head leaves of the California head lettuce sample sent us is due to a disorder we call brown stain. While the cause has not been positively established, California researchers have found the disorder to be

associated with relatively high carbon dioxide levels in transit." (App. 8)

Dr. Sherf, Professor of Plant Pathology at Cornell University "diagnosed the defect as being Russet spot". (App. 18)

Of the total price of $3,000, Buyer paid $2,350. Seller then filed its complaint with the Department of Agriculture for the contract balance on November 16, 1970. (App. 16)

Argument

The Warranty of Suitable Shipping Condition Did Not Apply In The Absence of Proof of Normal Transportation Service and Conditions

1. It is undisputed that when the lettuce was shipped on May 6, 1970, from Salinas, California, it met the contract specifications; that when the rail car arrived at the contract destination of Syracuse, New York, at 2 p.m. on Thursday, May 14, 1970, the lettuce inspected still met contract specifications; and that Buyer accepted the shipment. The Judicial Officer accordingly correctly found that the Buyer was liable to the Seller for the contract price less provable damages sustained by the Buyer as a result of any breach of contract by the Seller. (App. 16, 17) Once the Buyer has accepted the goods, the burden is upon him to establish any breach with respect to the goods accepted. U.C.C. § 2-607(4); *Miron* v. *Yonkers Raceway, Inc.*, 400 F.2d 112 (2d Cir. 1968); *O'Donnell Fruit Co. of Pittsburgh* v. *Mathew Mercurio*, 18 A.D. 1173.

The basis of the Judicial Officer's decision in favor of the Buyer was that the Seller breached the warranty of

suitable shipping condition in that the lettuce failed to conform to the "good delivery" standards of lettuce set forth in Section 46.44 of the Regulations [7 C.F.R. 46.44]. The technical meaning of "suitable shipping condition" is set forth in the Regulations containing trade terms and definitions which are specifically incorporated by reference in the memorandum of sale. (App. 6) Thus,

> "(j) 'Suitable shipping condition,' in relation to direct shipments, means that the commodity, at the time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties. If a good delivery standard for a commodity is set forth in Section 46.44, and that commodity at the contract destination contains deterioration in excess of any tolerance provided therein, it will be considered abnormally deteriorated. * * * *" 7 C.F.R. 46.43(j)

It was thus the burden of the Buyer to establish (1) that the shipment was "handled under normal transportation service and conditions" and (2) that the lettuce contained abnormal deterioration at the contract destination when delivered.

It is undisputed that the lettuce was shipped on May 6 and arrived at 2 p.m. on May 14, some eight days later. Normal transportation time from Salinas, California, to Syracuse, New York, is the "seventh morning", which means in time for the opening of the market at Syracuse at 6 a.m. the seventh morning after departure from Salinas. (App. 14, 35) Thus, since the lettuce did not arrive until the afternoon of the eighth, and, after inspection was ready for market on the morning of the ninth (May 15, 1970), it was two days late in transit. The Buyer submitted

no evidence to support its contention of the normal transportation service and conditions. Nevertheless, despite the undisputed late delivery, the Judicial Officer found as follows,

> "It appears, from the evidence before us, that the shipment involved herein was handled under normal transportation service and conditions. Accordingly, we conclude that the warranty of suitable shipping condition is applicable in this case." (App. 17)

On reconsideration, when this error was pointed out, the Judicial Officer stated "From our review of the record, it has not been established that this carload of lettuce *was* delayed in transit." (App. 23) It was not, of course, the Seller's burden either to establish that the carload was delayed or that the transportation service was not normal but rather it was the Buyer's burden to establish normal transportation service in order for the warranty of suitable shipping condition to apply. The Judicial Officer, thus, clearly erred in placing the burden of proof upon the Seller.

In any event, the Judicial Officer was erroneous in his finding of normal transportation and conditions so as to apply the warranty of suitable shipping conditions, because not only was there *no* evidence to support it, but the undisputed evidence clearly demonstrated the opposite. Lettuce is a highly perishable commodity. Time is thus of the essence and proper handling during shipment is essential. The Department of Agriculture has steadfastly followed this theory in ruling that delay negates "normal transportation service and conditions" and thus makes the warranty of suitable shipping condition inapplicable. Thus, in another reparations case, where lettuce was shipped by truck from California to Georgia, and the evidence showed that the shipment was 24 hours later than normal, it was

held that the Buyer could not rely on breach of warranty as a defense to the Seller's claim for the contract balance thusly,

> "Under the circumstances, we conclude that the transportation service and conditions afforded this shipment of lettuce were not normal, so that the warranty of suitable shipping conditions, including the 'good delivery' standards adopted for lettuce, have no application in this case. Accordingly, the fact that the lettuce showed excessive decay on arrival at destination is not a valid defense here." *Mutual* v. *Morgan*, 23 A.D. 882, 886 (1964)

In *Cusumano* v. *Recher*, 24 A.D. 903, 907 (1965) where a carload of lettuce that was shipped from Arizona to Detroit did not arrive on the "fifth morning" (December 9, 1962)–the carrier's normal time of arrival at Detroit–but the next evening at 6:40 p.m., the Secretary declined to allow the defense of breach of warranty even in the face of the Buyer's claim that it should not have been due until 7 a.m. on December 10. Thus,

> "But even assuming this to be true there was nevertheless a substantial delay on the part of the carrier in that the car was not placed until 6:40 p.m., December 10. Under the circumstances, it is concluded that the transportation services and conditions afforded this shipment of lettuce were not normal, so that the warranty of suitable shipping condition, including the good delivery standards adopted for lettuce, have no application in this case."

See also *J. J. Crosetti Co.* v. *Yeckes-Eichenbaum*, 30 A.D. 287 (1971); *Silliman* v. *Akron Coffee & Grocery Co.*, 10 A.D. 1100 (1951); *Laconadc* v. *Nem-Ar-Co.*, 24 A.D. 888 (1965). This rule has been similarly applied to other perishable commodities in reparations proceedings. In

Conn & Scalise v. *A. J. Produce Co.*, 23 A.D. 1128, 1132 (1964) where there was an admitted delay in the transit of mixed vegetables, it was said, "Since it appears that the transportation services and conditions were not normal, the suitable shipping condition rule is not available to respondent here." In *Fine* v. *Yukon*, 24 A.D. 1553 (1965), a delay of 31 hours made the warranty inapplicable. See also *Harris* v. *Damiano Fruit Co.*, 14 A.D. 1014 (1955); *Spada Distributing Co., Inc.* v. *Frank Kenworthy Co.*, 17 A.D. 347 (1958). It is thus abundantly clear that because of the two days delay in delivery of the highly perishable commodity, the warranty of suitable shipping condition was not applicable.

There Was No Evidence of
Violation of Good Delivery Standards

Even assuming that a warranty of suitable shipping condition applied, the Buyer failed to carry its burden of proof that there was "abnormal deterioration at the contract destination" upon delivery. The undisputed facts demonstrate that the lettuce was accepted and, therefore, in the possession of the Buyer on May 14, 1970, and remained there until the rail car was completely emptied and turned over to the railroad on May 20. The inspection by the Buyer on May 14 and by the Department of Agriculture on May 15 clearly demonstrate that the lettuce met contract specifications (and the "good delivery" standards set forth in 7 C.F.R. 46.44) on arrival at contract destination in Syracuse even though delivered late by the railroad.

The Judicial Officer disregarded the evidence of the visual inspection on May 14 and the Federal inspection on May 15. His finding that a portion of the lettuce still remaining in car after three more days was originally defective, even though it was under control of the Buyer,

and in the absence of evidence that proper refrigeration and other protective measures were taken to protect the highly perishable product, is so highly speculative as to be violative of the Congressional purpose in promulgating the Statute as well as being erroneous in sustaining the Buyer's required burden of proof.

> "The Perishable Agricultural Commodities Act is designed to protect the producers of perishable agricultural products who in many instances must send their products to a buyer or commission merchant who is thousands of miles away. It was enacted to provide a measure of control over a branch of industry which is almost exclusively in interstate commerce, is highly competitive, and presents many opportunities for sharp practice and irresponsible business conduct." *Zwick* v. *Freeman*, 373 F.2d 110, 116 (2d Cir. 1967)

See also *Chidsey* v. *Guerin*, 443 F.2d 584, 587 (6th Cir. 1971). Here the Seller did everything it could to make good delivery. The lettuce met all requirements on shipment and on delivery met the contract requirements with respect to the samples inspected.

While the evidence clearly demonstrates the critical importance of maintaining a temperature as close to freezing as possible, there was no evidence as to what the temperature was in the car between the government inspection on the morning of May 15 and that of May 18.[1] Buyer admitted it did not take the temperature of the car, and was "pulling lettuce from the car, as needed for sales". (App. 36) Since at least 500 of the 1,200 cartons were removed (and concerning which no complaint was made), "normal" conditions could hardly have been maintained.

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[1] Despite this, the Judicial Officer refers to "the near-optimum temperature prevailing in the car during the period May 15 – May 18." (App. 17)

Buyer suggested "abnormal deterioration" as to some of the remaining 700 cartons of lettuce[2] although not offering evidence as to the extent of the damage claimed or the decrease in market value, if any. While not making any finding as to what caused the deterioration, the extent of it, and any monetary loss occasioned thereby, the Judicial Officer cavalierly dismissed Seller's evidence that such deterioration was "brown stain"—as so found by the Department of Agriculture's own technicians (App. 8)—by saying that there was "nothing in the record before us to establish there *was* an excessive level of carbon dioxide present in Car PFE 475688 during transit" so that he could not "find support for complainant's [Seller's] position in the record before us". (App. 18) It was, of course, not the Seller's burden to prove that any deterioration was caused by transportation factors or poor storage conditions on receipt, but the Buyer's burden to establish "abnormal deterioration". The Judicial Officer thus erroneously applied the burden of proof to Seller rather than Buyer.

Again, in any event, the Judicial Officer failed to follow the Department's own rulings that an inspection so late after arrival and/or normal transportation time is too remote to establish the condition at contract destination so as to apply the warranty. Thus, in *Laconado* v. *Nem-Ar-Co.*, 24 A.D. 888, 891 (1965), where lettuce from Colorado to Chicago was diverted to Pittsburgh, where, upon inspection four days after normal transportation time to Chicago, the lettuce failed to meet contract specifications, the Buyer claimed breach of warranty for failure to meet "good delivery" standards on the basis that the results of the federal inspection would indicate there

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[2] Of course, only a portion were covered by the inspector's report of May 18, 1970. (App. 15)

would have been abnormal deterioration even if the lettuce had been delivered at Chicago. The Judicial Officer rejected this defense, ruling:

> "Under the circumstances, we consider that the results obtained from the inspection are too remote in time to establish the condition of the lettuce at Chicago, and to support a decision that the shipment did not meet the good delivery standards for lettuce as set forth in the regulations, in breach of the contract between the parties."

Thus, it is apparent that the Judicial Officer's conclusion that there was "abnormal deterioration" so as to constitute a breach of warranty is contrary to established policy and is clearly erroneous. This policy is not only reasonable in this situation of very perishable commodities in a highly competitive market, but again has been the standards regularly applied in previous cases and thus relied upon by shippers. Thus, in *Inness Bros. Inc.* v. *Fruit Supply Co. of Kansas City*, 17 A.D. 580 (1958) it was held that an inspection of watermelons five days after accepting and unloading was of little value in establishing their condition on arrival. In *D. L. Piazzo Co.* v. *Stacy Distributing Co.*, 18 A.D. 307 (1959) where carrots were accepted on arrival and decay was found in the remaining ones by a federal inspection four days later, it was held:

> "Since the inspection was made four days after the arrival of the carrots at the destination, the results obtained were inconclusive as proof of the condition of the carrots on the date of arrival."

Accordingly, Buyer failed to meet his burden of proof as to the alleged breach of warranty.

Failure to Explain Reversal of Prior Administrative Interpretation Requires Reversal of the Lower Court's Decision

The District Court affirmed the decision of the Judicial Officer in all respects and adopted his findings of fact. There was no fresh contest of the issues of fact before the lower court, and no fresh evaluation of witnesses. Essentially, therefore, this is a review of an administrative order by the Secretary of Agriculture.[3] The principles of administrative law pertaining to sufficiency of the findings and statement of reasons supporting the order thus have unique significance in this case.

Buyer claimed breach of warranty of suitable shipping condition as a defense to the reparations action brought by Seller. The stipulated facts showed that normal transportation service would put the shipment in Syracuse on the morning of May 13. It arrived on the afternoon of May 14 and, thus, could not be placed in the market for inspection and sale until the morning of May 15. It was a day and one-half late in arrival and, for purposes of inspection, was two days late.

Contrary to a long line of consistent interpretations in prior cases, the Judicial Officer ruled the late arrival made no difference in this case. The present ruling is not an extension of previously announced interpretations. It constitutes a radical departure from previous interpretation of the warranty of suitable shipping conditions

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[3] While the review provisions of the statute (7 U.S.C.A. 499 g(c)) provides for a trial *de novo*, that was not done here. The facts as found by the Judicial Officer were stipulated and the lower court affirmed. Appellant contends the facts do not support the order and that the order is contrary to the previous established policy of the Department. cf. *Trombeth Co.* v. *Goldstein & Procacci*, 198 F.Supp. 288.

wherein the Secretary of Agriculture has held that delays of one day or more prevent buyers from raising a defense of breach of warranty.

Even though the shipment of lettuce arrived late at destination, the inspection showed that the samples examined were within the tolerances of U.S. No. 1 grade. But the Judicial Officer (acting for the Secretary of Agriculture) disregarded this inspection and based his finding of breach of warranty on a subsequent inspection three days later. Again this represented a radical departure from a previously announced long-standing policy of the Secretary whereby he has ruled that inspections several days after the arrival date are too remote to establish condition of the produce.

There is no adequate explanation for this change in policy if it be a change in policy and not just administrative error. The warranty of suitable shipping condition is a regulation promulgated by the Secretary. There is no question that the Secretary has the right to interpret his own regulations. Normally, the Court will follow such interpretation when it is reasonable and has been consistently adhered to for a number of years. *Gillarde Co.* v. *Joseph Martinelli & Co.*, 169 F.2d 60 (1st Cir., 1948). But here there is a departure from prior policy. Under similar circumstances, when reviewing an order of the Civil Aeronautics Board, this Court noted that the order of the Board represented a "total reversal of policy." *ABC Air Freight Co.* v. *C.A.B.*, 391 F.2d 295, 301 (2d Cir., 1968). The Court then held the order should be vacated because:

> "... we find it wanting in the careful investigation, the substantial evidence and the rational explication that are demanded before an expert agency may lawfully embark on a new course...." (p. 307)

The rationale of the *ABC Air Freight* case has become firmly established in the law today. It is absolutely essential to orderly commercial practice that it be followed here. A vast amount of business is regulated by administrative agencies. Those so regulated must rely on consistent and rational administration of the laws under which they operate. The Perishable Agricultural Commodities Act was designed to protect shippers of perishable commodities who must deal in a highly competitive market with goods which cannot be stored and are often purchased and sold at markets thousands of miles away from the growing region. See *Zwich* v. *Freeman. supra.*

Seller has two certificates of inspection showing compliance with its contract. The shipment was found defective five days after the scheduled arrival date. If the Secretary now intends to permit inspections this remote in time to be used in proving breach of warranty, the least he can do is advise the shippers as to the reasons for such a reversal of policy. This is the rule announced by this Court in *ABC Air Freight Co.* v. *C.A.B., supra.* It has been followed with respect to other agencies and in other circuits. See *Chemical Leaman Tank Lines, Inc.*, v. *United States,* 368 F.Supp. 925, 941 (U.S.D.C. Del., 1973); *Northeast Airlines, Inc.* v. *C.A.B.*, 333 F.2d 579 (1st Cir., 1964).

Conclusion

WHEREFORE, it is respectfully submitted that the judgment of the United States District Court for the Northern District of New York be reversed and judgment be directed to be entered in behalf of appellant.

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SALINAS LETTUCE FARMERS COOPERATIVE, :

Appellant, :

v. : Docket No. 75-7160

SALT CITY PRODUCE CO., INC., :

Appellee. :

CERTIFICATE OF SERVICE

I, Edgar T. Bellinger, hereby certify that I mailed, postage prepaid, two copies of the printed Brief of Appellant to Thomas F. Pasqua, Esquire, 1010 Hill Building, Syracuse, New York 13202, attorney for appellee Salt City Produce Co., Inc., this 27th day of June, 1975.

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